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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 753

THOMAS T. COHEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit.

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In the Supreme Court of the United States

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No. _____.

THOMAS T. COHEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals For the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on September 8, 1966, affirming the conviction of petitioner in the United States District Court for the District of Arizona on ten counts of mail fraud, pursuant to 18 U. S. C. § 1341 and one count of using a fictitious name to effect a mail fraud, pursuant to 18 U. S. C. § 1342.

CITATIONS TO OPINIONS BELOW.

The district court entered judgment of conviction and sentence on May 17, 1965, without opinion.

The opinion of the Ninth Circuit Court of Appeals is unreported and is printed in Appendix, *infra*, pp. 32-42.

JURISDICTION.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered in the subject case on September 8, 1966. Upon petitioner's timely application, the time within which petition for certiorari might be filed was extended by this Court from October 8, 1966 until November 7, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

I.

Where, pursuant to federal indictment, petitioner was incarcerated for approximately seventeen months in a federal penitentiary in Florida while awaiting trial because he was unable to raise bail, but was subsequently released without trial when the government dismissed the indictment against him for insufficient evidence, a federal indictment for unrelated offenses was returned against petitioner in Arizona during the period of his detention in Florida, approximately nine months before his release, and petitioner was neither notified, nor served with a copy of the Arizona indictment until the very day of his release from the Florida federal penitentiary, where the Arizona federal court subsequently dismissed the indictment upon an express finding that petitioner's right to a speedy trial had been violated, petitioner was reindicted for the same offenses approximately one and one-half months later, petitioner's subsequent timely motion to dismiss upon the same constitutional ground was denied and petitioner was compelled to stand trial more than three and one-half years after the commission of the offenses charged in the indictment, does a federal conviction so obtained violate the Fifth and Sixth Amendments to the United States Constitution?

II.

Under the circumstances described in Question I, does the refusal of the federal district court to dismiss the second Arizona indictment constitute reversible error within this Court's general supervisory power over federal criminal proceedings?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

Constitutional Provisions.

The pertinent portions of the provisions of the United States Constitution here involved are set out below:

AMENDMENT V:

"* * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law * * *."

AMENDMENT VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy * * * trial * * *."

Statutes.

18 U.S.C. § 1341: Frauds and swindles

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any

matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

18 U. S. C. § 1342: Fictitious name or address

"Whoever, for the purpose of conducting, promoting, or carrying on by means of the Post Office Department of the United States, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

The pertinent portion of 18 U. S. C. § 3731, authorizing an appeal by the United States, provides:

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section."

Rules.

Rule 48(b) Federal Rules of Criminal Procedure:

"If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

STATEMENT.

Petitioner was successively indicted in the Southern District of Florida on June 13, 1962, August 2, 1962 and October 17, 1962, for federal offenses not related to the conviction which is the subject of this petition. TR. 30-31; RT. 33-34.[1] Unable to raise bail, petitioner remained in federal custody in Florida awaiting trial from June 13, 1962 until November 8, 1963, a period of approximately seventeen months. TR. 30-31; RT. 33-35. But the government dismissed the indictments for lack of evidence, the charges were never again presented to the federal grand jury, and petitioner was released without ever having been brought to trial. RT. 35. On November 8, 1963, the very day when the last of the Florida indictments was dismissed and petitioner was to be released from jail, he learned for the first time that, approximately nine months earlier, on February 27, 1963, the federal grand jury in Arizona had indicted him for twelve counts of mail fraud and related offenses under 18 U. S. C. §§ 1341 and 1342 which had allegedly occurred between May 1 and August

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[1] The Transcript of Record is referred to throughout as "TR." The Reporter's Transcript of Proceedings is referred to as "RT." and the Official Transcript of Proceedings is referred to as "TP." Numerical references which follow these designations are to page numbers in the pertinent volumes.

31, 1961. TR. 1-15; RT. 35, 37. On November 8, 1963 he was served with a warrant for his arrest, taken into custody once more, and returned to Phoenix, Arizona to respond to the new federal charges. TR. 16; RT. 35. The record shows that although the federal marshal in the southern district of Florida had been in possession of the arrest warrant since March 4, 1963, and petitioner had been held in custody by federal authorities in the same district during the entire period, no attempt was made to serve petitioner with the warrant or notify him of the new federal indictment in Arizona for more than eight months thereafter. TR. 16; RT. 37.

Petitioner's first opportunity to obtain counsel to defend him on the Arizona indictment occurred in December, 1963. RT. 23. He was arraigned and pleaded not guilty to all counts of the indictment in Arizona on December 30, 1963. TR. 74. On January 25, 1964, petitioner filed a timely motion to dismiss the indictment for lack of a speedy trial. TR. 75-76; RT. 1-65. A hearing on the motion to dismiss was held on July 27 and July 28, 1964. TR. 75-76; RT. 1-65. The colloquy at that hearing is instructive:

> The Court: "This is an unusual situation, where a man would be indicted in February of 1963 and wouldn't know about it until what?"
>
> Mr. Green (defense counsel): "November, your Honor."
>
> The Court: "Nine months later. That was all right a century or so ago, probably. But today—
>
> "I want to know why, what the excuse, what's the Government's excuse for not arraigning this man long before."
>
> Mr. Karas (government counsel): "I have no excuse, your Honor, except that the man was incarcerated in Florida on another charge."

The Court: "Well, he was a federal prisoner, wasn't he?"

Mr. Karas: "Yes, sir. And I am sure a detainer was placed on him."

* * * * *

The Court: "Why didn't they [federal marshals] bring this man here and arraign him?"

* * * * *

The Court: "The Sixth Amendment to the Constitution says that every man charged with a crime shall be entitled to a speedy and public trial by jury."

Mr. Karas: "Yes, sir."

The Court: "Is that a speedy and public trial by jury?"

Mr. Karas: "No, sir, it is not * * *." RT. 26-27.

* * * * *

Mr. Karas: "* * * Now, immediately following the dismissal on November 8th of 1963, Mr. Cohen was immediately returned to Phoenix on the Phoenix indictment returned on February 27, 1963."

The Court: "But he says that you indicted him here on February 27, 1963, and you deemed to tell him about it nine months later."

* * * * *

The Court: "But you are prosecuting this man for a crime."

Mr. Karas: "Yes, sir."

The Court: "You are asking 75 years of his liberty here, possibly."

Mr. Karas: "Yes, sir."

The Court: "Now, why shouldn't he be arraigned promptly? Why shouldn't he have been arraigned promptly upon that indictment?

"It's like—well, it savors of Russia to me. You could have indictments pending all over the country against a man, just like ammunition in the locker, and if someone fires at him and misses him, then

when he passes the next station, why they can pull another one out and shoot at him at their pleasure. The Government shouldn't proceed that way * * *" RT. 35-36.

* * * * *

The Court: "It just offends every sense of the right to a speedy trial under the Sixth Amendment for you to hold an indictment nine months and not even tell the man about it."

Mr. Karas: "Well, I cannot say whether he was told or not, your Honor. I don't know."

The Court: "He says he wasn't. Now, you don't have anything to dispute it, do you?"

Mr. Karas: "No, sir, I do not. But * * *, in the absence of a showing that the Government's conduct is oppressive and intentional—I feel that Mr. Cohen's rights have not been violated."

The Court: "Well, Mr. Karas, if you had an indictment hanging over your head, I dare say you would feel a little oppression."

Mr. Karas: "Yes, sir, I would."

The Court: "Particularly if the Government was asking to take 75 years of your freedom." RT. 35-37.

* * * * *

The Court: "Well, what possible excuse is there for not bringing him here and arraigning him on this indictment promptly, and bringing him to trial?"

Mr. Karas: "I believe the decision was based on Mr. Cohen awaiting trial in Florida. And I assure and avow to the Court that in this entire office there was no collusion whatsoever."

The Court: "I am not suggesting there was. All I am suggesting is that there is a jet airplane between Miami and Phoenix, and you can make it in about five hours. He could have been brought here one day, and arraigned the next day, and returned the following day. And he would have missed three days in Florida."

Mr. Karas: "That would be for his arraignment. * * *"

The Court: "And bring him back for trial promptly. You are prosecuting the man."

Mr. Karas: "Yes, sir."

The Court: "You don't prosecute a man by having an indictment returned against him and then tell him about it nine months later when you already have him in durance vile * * *." RT. 38-39.

* * * * *

Mr. Karas: "Well, again, your Honor, if I could just say one brief statement concerning the court's dismissal of this indictment for lack of speedy prosecution.

"I feel the court is fully aware of the circumstances. I can't enlighten the court any further on that point. But I feel that Rule 48(b) is the enforcement of the right to a speedy trial under the Constitution."

The Court: "Yes." RT. 57-59.

* * * * *

The Court: "* * * You know what the Government's duty is under the Sixth Amendment. If there was any motion for a trial setting to be made, of course, the Government should have made it. The Government is prosecuting this man. He should have been promptly arraigned. He should have been brought to a speedy trial. And when it is put squarely to me, as defense counsel does, to rule on this motion, I would stultify myself to deny it, when the man has not even been told of the existence of the indictment for nine months."

"How could he make a motion for a trial setting? He didn't even know he was indicted here."

Mr. Karas: "Well, your Honor, I realize the court is looking at the Constitution that a defendant has a right to a speedy trial, but—"

The Court: "It isn't a question of whether the Government is oppressive. It isn't a question of whether the defendant is prejudiced. The presumption is he is prejudiced.

"Isn't any man prejudiced who has an indictment such as this, with a maximum punishment of 75 years imprisonment in a federal penitentiary hanging over him for nine months, and not even know about it?" RT. 59-60.

* * * * *

The Court: "I may be in error on this matter, but I am not in doubt. My duty is to dismiss the indictment. And it will be so ordered." RT. 62-63.

The oral ruling of dismissal was reduced to a written order dated July 28, 1964. TR. 72-73. After finding that "the defendant *. * * was denied an opportunity to prepare his case and to have a right to a speedy trial" and that "the defendant has been deprived of his right to a speedy trial pursuant to the Sixth Amendment of the Constitution of the United States," the district court dismissed the indictment "upon the ground of unreasonable delay in bringing the defendant to trial. [Fed. R. Crim. P. 48(b).]" TR. 73.

Approximately six weeks after the dismissal of the indictment, the federal grand jury for the Arizona district returned an identical indictment against petitioner, bearing a different case number. TR. 1-15; 77-91.

Petitioner filed a timely motion to dismiss the new indictment with prejudice on the ground that the dismissal of the earlier indictment was a bar to prosecution under its counterpart, TR. 91-97, but on December 14, 1964, the court denied the motion to dismiss because petitioner "fail[ed] to disclose wherein the defendant is prejudiced under the new indictment or wherein his rights under the Fifth or Sixth Amendments of the Con-

stitution have been violated" and because the court in dismissing the earlier indictment "based its order of dismissal upon the Government's failure to prosecute, which does not bar a new indictment." TR. 103-105.

The trial on the merits of the second indictment, dealing with offenses alleged to have been committed almost four years earlier, began on March 9, 1965, approximately two years after the first Arizona indictment had been returned.

The indictment was lengthy and complex. TR. 77-91. The trial involved the testimony of more than 60 witnesses, and 129 documentary exhibits, composed of thousands of separate items. TR. 208-214; TP. 2-2B; 405-405C, 736-736C, 1116. The normal difficulties incident to the defense in a complex trial involving numerous counts and vast documentary proofs were compounded by the delay in indictment, the delay in notifying petitioner of the charges against him, the delay in arraignment, and the delay in bringing petitioner to trial. Except for the precise details of their direct testimony, which had been reinforced by recent government preparation, the recollections of many government witnesses were dimmed by the passage of four years' time. TP. 39-41, 130, 132, 137, 141, 143, 180, 181, 186, 237, 238-242, 252-254, 320, 323, 326-328, 387, 401, 449-450, 618, 968, 1169-1170. The pretrial unavailability to the defense of pertinent documents, coupled with their lack of knowledge of their whereabouts,[2] TP. 54, 60-63, 67, 305-307, 309, and the difficul-

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[2] Petitioner left Phoenix in August of 1961, the offices of the corporations mentioned in the indictment were padlocked and the corporate records were locked inside. TP. 310. The landlord unlocked the door and the records were transported by corporate employees to the office of a lawyer, from whom government agents obtained them during the course of their in-

(Continued on following page)

ties experienced by defense counsel in contacting witnesses previously interviewed by the Government, TP. 192-193, is traceable, at least in part, to petitioner's detention in Florida without knowledge of the charges against him during the critical period when the Government was interviewing its witnesses and gathering its documentary proof. At least one of the material witnesses died in the interim between the indictment and the trial. TP. 637. Nor is there anything in the record to suggest that petitioner's determination not to take the stand in his own defense was not at least partially grounded upon his own dimmed recollection, TP. 69-71, compounded by lack of access to the records and documents in the possession of the Government which the prosecution eclectically offered into evidence against him.

On March 17, 1965, the jury returned a verdict of guilty on the eleven counts submitted to them. TR. 202, TP. 1281-1282. On May 17, 1965, petitioner's motions for arrest of judgment and for judgment of acquittal or, in the alternative, for new trial were denied. TR. 203. Petitioner's sentence to two years imprisonment on each count, to run concurrently, was appealed. On September 8, 1966, the Ninth Circuit Court of Appeals affirmed the verdict and judgment of the district court. It is this adverse ruling from which petitioner seeks relief in this Court.

(Continued from preceding page)

vestigation of the mail fraud charges against petitioner. TP. 310. Petitioner had no access to such corporate records until the time of trial and, although the Government expressly disavowed having any documents procurable under Rules 16 and 17(c), Fed. R. Crim. P., RT. 9-10, the Government introduced much of such documentary evidence at the trial and concedes that it did not permit the defense to inspect all of the corporate records in advance of trial. TP. 305-306.

REASONS FOR GRANTING THE WRIT.

I.

PETITIONER'S CONVICTION VIOLATED THE SPEEDY TRIAL CLAUSE OF THE SIXTH AMENDMENT.

The Sixth Amendment guarantee of the right to a speedy trial [3] "is of long standing and has been jealously guarded over the centuries." [4] Its origin in the Magna Carta, its importance to the founders and its early history in this country are set out in detail elsewhere.[5]

The function and purpose of the right to a speedy trial have been described by jurists, both early and late.

Judge Tod described the purpose of the right to a speedy trial in this fashion:

> "I think it was intended to provide against the abuse of a protracted trial, to provide not only against the malice of a prosecutor, but against his negligence, against all *his* delays whether with cause or without cause, against every possible act, or want of action, of the prosecutor; but not to shield a prisoner in any case from the consequences of any delay made necessary by the law itself." [6]

Judge Wright noted in a recent analysis of the Sixth Amendment guarantee:

> "In curtailing the length of criminal prosecutions, the law recognizes certain interests of the person accused and attempts to protect those interests. Speedy trial provisions seek, first, to prevent lengthy pretrial imprisonment where the accused is unable to make

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[3] U. S. Const., Amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *."

[4] *Petition of Provoo*, 17 F. R. D. 183, 196 (D. Md.), *aff'd without opinion* 350 U. S. 857, (1955).

[5] *Id.* at 196-199.

[6] *Commonwealth v. Sheriff & Gaoler*, 16 Serg. & R. 304 (Pa. 1827).

bail, or pretrial restriction of movement when bail is available. Second, and perhaps equally important, these provisions seek to minimize the anxiety and attendant evils which are invariably visited upon one under public accusation but not tried. Finally, they seek to insure that the ability of the accused person to answer the charge will not be impaired on account of lost witnesses and faded memories due to the passage of time." [7]

And this Court has recently made similar observations about the purpose of the Speedy Trial Clause.[8]

Despite its deep roots in Anglo-American jurisprudence, the Speedy Trial Clause has been very largely ignored by the commentators,[9] Congress [10] and this Court.[11]

But the fact that the lower federal courts have been actively called upon to explore the nature of the right and

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[7] *Hanrahan v. United States*, 348 F. 2d 363, 366-367 (D. C. Cir. 1965).

[8] *United States v. Ewell*, 383 U. S. 116, 120 (1966):

"[The Sixth Amendment's guarantee of a speedy trial] is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself."

[9] For a few student comments, see Note, 57 Colum. L. Rev. 846 (1957); Note, 64 Yale L. J. 1208 (1955); Comment, 31 U. of Chi. L. Rev. 535 (1964).

[10] There have been no federal statutes implementing the right to a speedy trial. In 1948, Rule 48(b), Fed. R. Crim. P., was adopted to provide the only non-constitutional restriction on delay in trials in the federal court system.

[11] For a thorough discussion of the right, see *Petition of Provoo*, 17 F. R. D. 183 (D. Md.) *aff'd without opinion*, 350 U. S. 857 (1955). This Court has not dealt with the right in depth although it has considered problems of speedy trial peripherally and infrequently. See *Beavers v. Haubert*, 198 U. S. 77 (1905); *Pollard v. United States*, 352 U. S. 354 (1957); *Smith v. United States*, 360 U. S. 1 (1959); *United States v. Ewell*, 383 U. S. 116 (1966).

apply it in numerous fact situations [12] with a paucity of guidance from the opinions of this Court [13] demonstrates the currency and urgency of speedy trial considerations and the compelling need for this Court to examine, both to delineate the constitutional right and as a function of its supervisory power over federal criminal proceedings, the form and content of the right to a speedy trial.

It is petitioner's intention to demonstrate that (A) by application of the rules enunciated by the inferior federal courts (which this Court is urged to adopt as its own), he has been denied the guarantee of a speedy trial, and (B) the denial of petitioner's right to a speedy trial has previously been litigated, determined in petitioner's favor, and can no longer be disputed.

A.

Considering His Incarceration, Two Indictments and Subsequent Trial as a Whole, Petitioner Has Been Denied a Speedy Trial in Violation of the Sixth Amendment.

It must be emphasized that the federal prosecution of the petitioner was begun long before the particular indictment, trial and conviction from which petitioner seeks relief in this Court.

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[12] E.g., *Mann v. United States*, 304 F. 2d 394 (D. C. Cir. 1962); *Hanrahan v. United States*, 348 F. 2d 363 (D. C. Cir. 1965); *United States v. Parrott*, 248 F. Supp. 196 (D. C. D. C. 1965); *Nickens v. United States*, 323 F. 2d 808 (D. C. Cir. 1963); *United States v. McWilliams*, 163 F. 2d 695 (1947); *Williams v. United States*, 250 F. 2d 19 (D. C. Cir. 1957); *Taylor v. United States*, 238 F. 2d 259 (D. C. Cir. 1956); *King v. United States*, 265 F. 2d 567 (D. C. Cir. 1959); *Fouts v. United States*, 253 F. 2d 215 (6th Cir. 1958); *United States ex rel. Coleman v. Cox*, 47 F. 2d 988 (5th Cir. 1931); *Frankel v. Woodrough*, 7 F. 2d 796 (8th Cir. 1925); *United States v. Chase*, 135 F. Supp. 230 (D. C. N. D. Ill. 1955); *Hedgepeth v. United States*, 364 F. 2d 684 (D. C. Cir. 1966); *United States v. Sherwood*, 38 F. R. D. 14 (D. Conn. 1964).

[13] See footnote 11, *supra*.

The record as a whole demonstrates a Kafkaesque example of an individual crushed by massive and successive deployment of governmental power. Consider the fact of petitioner's incarceration for almost a year and a half in a federal penitentiary on federal charges which never materialized into a trial because of insufficient prosecution evidence. Consider the fact that while he remained helpless in the hands of federal authorities, an arm of that same federal authority a near-continent away brought other serious charges against him which, while it was conducting its own investigation, interviewing its witnesses and gathering its documentary evidence at its leisure, it kept secret from him for almost nine months. Note the fact that when a federal district court finally dismissed the indictment because of the oppressive, prejudicial and unconstitutional government conduct, a new federal indictment, identical in substance and form, was returned against petitioner. Add the fact that, despite his timely and continuing protests, he was forced to stand trial on the merits of the charges in the new indictment almost four years after their alleged occurrence. And consider the obstacles to the defense in a complex mail fraud prosecution: compelled delay of almost a year after indictment in obtaining counsel, limited funds for investigation because of petitioner's inability to have gainful employment during the year and a half he was imprisoned immediately prior to his first arraignment on the mail fraud charges, the refusal of the government to permit defense counsel to inspect all the documents relevant to the charges in advance of trial. An ugly mosaic of installment harassment and oppression of the petitioner by the government emerges which is repugnant to the standards of a civilized society and utterly inconsistent with the attempts which this Court has made to make more nearly equal the in-

herently unequal struggle between the individual and the government in criminal proceedings.

Nor are there any problems of federalism to complicate the picture of oppressive government conduct here portrayed. The prison that held petitioner, the several grand juries which indicted him, the postal authorities who instituted and conducted the investigation of petitioner's activities, the district attorneys in Florida and Arizona who prosecuted him, the marshal who kept the warrant for petitioner's arrest on the first Arizona indictment in his pocket for more than eight months, the district judge who forced petitioner to stand trial on the second Arizona indictment and the jury which convicted him—all were creatures of the federal government, responsive to and subject to the control of, that same authority.

While this Court has declared that the speedy trial guarantee "is necessarily relative" and "depends upon circumstances" [14] and that, in determining "[w]hether delay in completing a prosecution amounts to an unconstitutional deprivation of rights * * * [t]he delay must not be purposeful or oppressive," [15] the lower federal courts have analyzed the right in somewhat more detail in terms of (1) the length of delay, (2) the party responsible for the delay, (3) the motivation of the delaying party and (4) the prejudice to the accused.[16]

1. Length of Delay.

With regard to the length of the delay, it has been held that "[t]here is no touchstone of time which sets a

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[14] *Beavers v. Haubert*, 198 U. S. 77, 78 (1905).

[15] *Pollard v. United States*, 352 U. S. 354, 361 (1957).

[16] *United States v. Parrott*, 248 F. Supp. 196, 202 (D. C. D. C. 1965).

fixed maximum period that automatically requires application of the Sixth Amendment," [17] but that "[a] determination of whether the Sixth Amendment has been violated necessitates a consideration of the entire period between offense and eventual trial." [18]

In *Hanrahan v. United States*, 348 F. 2d 363 (D. C. Cir. 1965), the court was faced with the question of "whether, in appraising appellants' claimed denial of speedy trial * * * successive [mail fraud] indictments alleging the same scheme but different mailings should be looked upon as two separate prosecutions or as mere parts of one continuing prosecution." [19] The court ruled that "the purposes behind the speedy trial provisions * * * require that the facts in this case be considered as one continuing prosecution." [20]

It becomes clear, therefore, that in the instant case the entire episode, from commission of the alleged offenses in May, 1961, through petitioner's detention in federal prison from June 13, 1962 to November 8, 1963, his indictment on February 27, 1963, his arraignment on December 30, 1963, the dismissal of the indictment on July 28, 1964, his re-indictment on September 9, 1964 and his trial from March 9, 1965 to March 17, 1965—a period from beginning to end of almost four years—satisfies the most exacting definition of Sixth Amendment Speedy Trial Clause violation, in terms of the length of delay required to demonstrate constitutional infirmity.

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[17] *Hedgepeth v. United States*, 364 F. 2d 684 (D. C. Cir. 1966).

[18] *United States v. Parrott*, 248 F. Supp. 196, 202 (D. C. D. C. 1965).

[19] 348 F. 2d 363, 366 (D. C. Cir. 1965).

[20] *Ibid.*

2. Party Responsible for Delay.

It is elementary that an accused cannot complain of a delay in prosecution or trial for which his own conduct has been primarily responsible.[21] But "[i]t must be borne in mind that the prosecution, not the defense, is charged with bringing a case to trial. The Government may not 'sit back' and then argue that defendant's inaction conclusively waived his right to a speedy trial." [22]

Neither extended absence of the accused from the trial jurisdiction,[23] nor imprisonment of the accused in another jurisdiction[24] justify failure of the prosecution to bring an accused promptly to trial, but such facts do excuse an accused from acting affirmatively to request an early trial. It is abundantly clear, however, that "a defendant who is unaware that he is under indictment cannot be held to have waived his right [to a speedy trial]." [25] Delay in prosecution or trial is particularly pernicious where the accused has been denied knowledge of the fact that charges have been brought against him.

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[21] E.g., *Shepherd v. United States*, 163 F. 2d 974 (8th Cir. 1947) (accused skipped bail); *Fouts v. United States*, 253 F. 2d 215 (6th Cir.) rehearing 258 F. 2d 402 (6th Cir.), cert. den. 358 U. S. 884 (1958); *United States v. Alagia*, 17 F. R. D, 15 (D. Del. 1955) (acquieseence in a series of postponements).

[22] *Hedgepeth v. United States*, 364 F. 2d 684, 687-688 (D. C. Cir. 1966).

[23] *Taylor v. United States*, 238 F. 2d 259 (D. C. Cir. 1956).

[24] *Ibid.* And see *Fouts v. United States*, 253 F. 2d 215, 217 (6th Cir. 1958): "It is well established that the accused does not forfeit his right to a speedy trial solely because of his being confined in the penitentiary." See also *United States ex rel. Coleman v. Cox*, 47 F. 2d 988 (5th Cir. 1931); *Frankel v. Woodrough*, 7 F. 2d 796 (8th Cir. 1925); *United States v. Chase*, 135 F. Supp. 230 (D. C. N. D. Ill. 1955).

[25] *Fouts v. United States*, 253 F. 2d 215, 218 (6th Cir. 1958); *Taylor v. United States*, 238 F. 2d 259, 261 (D. C. Cir. 1956); *United States v. Sherwood*, 38 F. R. D. 14 (D. Conn. 1964).

"With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear. With each day the accused becomes less able to make out his defense. If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags. Under our constitutional system such a tactic is not available to police and prosecutors." [26]

In the instant case there can be no doubt that petitioner was not responsible in any way for the delays here involved. For the first two and one-half years after the occurrence of the alleged offenses, petitioner either had not been indicted or was unaware of his indictment. During the year and a half of this period in which petitioner was detained in a federal prison in Florida, his whereabouts were known to federal authorities even though he himself was unaware of the Arizona indictment against him. A federal marshal in the very federal district in which he was detained had a warrant for petitioner's arrest in his possession for more than eight months, but failed to serve petitioner with it until the very day of his release from prison. Where the obligation to act affirmatively fell under these circumstances is sharply evident: the federal government.

3. The Motivation of the Delaying Party.

Pollard v. United States, 352 U. S. 354 (1957), teaches that "the delay must not be purposeful or oppressive." [27]

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[26] *Nickens v. United States*, 323 F. 2d 808, 812 (D. C. Cir. 1963) (Wright, J., concurring).

[27] 352 U. S. 354, 361 (1957).

But the lower federal courts have refined the rule as it relates to the motivation of the delaying party.

> "There is no absolute test as to what constitutes purposeful delay. Bad faith or chicanery on the part of the Government is not a necessary element. It is enough if the Government has made a deliberate choice for a supposed advantage, which caused as much oppressive delay and damage to the defendant as it would have caused if it had been made in bad faith." *United States v. Parrott*, 248 F. Supp. 196, 203 (D. C. D. C. 1965).

A violation of the guarantee of speedy trial is shown if "the prosecution was conducted with such disregard of [the accused's] interests that it can be said that the delay resulted from deliberate, or at least negligent, actions on the part of the prosecutor * * *."[28] It has even been suggested that "the application of [the Sixth Amendment speedy trial provision] does not turn on the question of responsibility. Even if no agency or instrumentality of the Government is responsible for the delay, where there has *in fact* been a substantial delay not of the defendant's own choosing—i.e., where he has not waived his right to a speedy trial—there has *in law* been a denial of a speedy trial."[29]

In the instant case, petitioner does not charge the federal government or its agents with chicanery or bad faith in permitting him to languish in prison on unsubstantiated charges, without informing him that he had been charged with other federal offenses thousands of miles away for a period of nine months after his indict-

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[28] *Hanrahan v. United States*, 348 F. 2d 363, 368 (D. C. Cir. 1965).

[29] *King v. United States*, 265 F. 2d 567, 572 (D. C. Cir. 1959) (Bazelon, J., dissenting). Cf. *Commonwealth v. Sheriff*, *op. cit.*, footnote 6, p. 13, *supra*, and accompanying text.

ment. While it can hardly have been a coincidence that petitioner was served at last with a warrant for his arrest on the Arizona charges on the precise day of his scheduled release from the Florida federal prison, the failure of the Government to serve him nine months earlier can reasonably be attributed to a deliberate choice of the Government, for tactical reasons of its own, to arrest petitioner on the Arizona indictment only after the Florida charges had been disposed of. The tactical advantages to the prosecution of the detainer system[30] have been well summarized by a recent commentator:[31]

> "Whether the prosecutor represents the federal government or the state, so long as a conventional detainer system continues to operate there appears to be little leverage to hasten final action on a charge pending against a prisoner incarcerated in another jurisdiction. 'The prosecuting attorney who filed the charges knows that the prisoner can be found when he is wanted and that all he has to do is have the sheriff call at the institution the date the prisoner is to be discharged and take him into custody. Consequently he puts the case at the bottom of the docket and forgets about it. * * *' Moreover the prosecuting attorney has little motivation to press his charges when the defendant is already incarcerated, save where there is danger that prosecution evidence will be lost. The possibility of the imposition of concurrent sentences may actually deter prosecutorial action once the detainer is filed:
>
> Prosecutors generally prefer to adopt a wait-and-see attitude concerning trial of prisoners. If the defendant is forced to serve a full (and long) sentence,

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[30] A "detainer" is a term used to describe a formal request for notification of a prisoner's release date so that new process may be served upon him at his release.

[31] Comment, The Detainer System and the Right to a Speedy Trial, 31 U. of Chi. L. Rev. 535, 540-541 (1964).

the prosecutor will probably decide not to try him on the pending charge. If, however, the defendant is paroled, then he may face trial. Moreover, the state is concerned lest the accused's sentences run concurrently if he is accorded prompt trial and convicted."

Many of these considerations may apply in the case at bar to explain the delaying conduct of the federal government. But whether the delay resulted from the tactical choice of the prosecution, or prosecutorial negligence, or indifference to petitioner's plight, the violence to the right of speedy trial is the same.

4. Prejudice to the Accused.

It has been suggested earlier[32] that the purpose of the Speedy Trial Clause was to protect the accused against imprisonment for extended periods without bail, to minimize his anxiety and concern accompanying unresolved criminal charges and to prevent impairment of his ability to defend himself. It is apparent that petitioner has suffered all of the evils against which the speedy trial guarantee was designed to protect him. He has been imprisoned for a year and a half, to no purpose. He has been subjected to the consequences of criminal charges in two successive, identical indictments for a period of more than two years from indictment to trial, almost four years from offenses to trial. And so far as the prejudice to his defense is concerned, the lapse of almost a year after his indictment before he was able to obtain counsel, his scattered corporate records, the dimmed memories of the witnesses, the death of a material witness and the pretrial discovery problems which were compounded by the delay are set out in detail elsewhere in this petition.[33]

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[32] See footnote 8, *supra*.

[33] See pp. 11-12, *supra*.

But it must be noted that "the very assumption of the Sixth Amendment is that unreasonable delays are by their nature prejudicial. It is not generally necessary for the defendant to demonstrate affirmatively how he has been prejudiced by an unreasonable delay." [34] "Where the delay is substantial, prejudice may be presumed and the Government bears the burden of showing that no prejudice has resulted." [35]

In the case at bar no such burden has been assumed by the prosecution, nor could it in fact do so, because of the clear showing of prejudice in the record.

B.

Finding of Speedy Trial Violation Barred Subsequent Finding to the Contrary.

Although petitioner has demonstrated a clear violation of the Speedy Trial Clause of the Sixth Amendment in argument (A) *supra*, pp. 15-24, he now urges that that question is foreclosed by a prior order in the federal district court in his favor.

On July 28, 1964, Judge Mathes found that petitioner had been "denied an opportunity to prepare his case and to have a right to a speedy trial" and that he had been "deprived of his right to a speedy trial pursuant to the Sixth Amendment of the Constitution of the United States," and dismissed the indictment against petitioner. The Government failed to appeal the dismissal of the indictment, although it could have done so. 18 U. S. C.

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[34] *Hedgepeth v. United States*, 364 F. 2d 684, 687, f.n. 3 (D. C. Cir. 1966); *Petition of Provoo*, 17 F. R. D. 183, 203 (D. Md.) *aff'd. per curiam*, 350 U. S. 857 (1955).

[35] *United States v. Parrott*, 248 F. Supp. 196, 203 (D. C. D. C. 1965); *Williams v. United States*, 250 F. 2d 19 (D. C. Cir. 1957); *Taylor v. United States*, 238 F. 2d 259 (D. C. Cir. 1956); *United States v. Lustman*, 258 F. 2d 475, 478 (2d Cir. 1958).

§ 3731. Instead, it reindicted petitioner on charges identical to those which had been dismissed, and a second judge, sitting in the Arizona district, denied petitioner's motion to dismiss the second indictment.

The Ninth Circuit Court of Appeals, by a gross misconception of the function and purpose of Rule 48(b) Fed. R. Crim. P. and an equally gross misreading of *Mann v. United States*, 304 F. 2d 394 (D. C. Cir. 1962), has sanctioned this end run around the Sixth Amendment and federal criminal procedure in a manner which compels review by this Court, both in the exercise of its federal supervisory authority and its function of constitutional review.

It has already been noted[36] that Rule 48(b) Fed. R. Crim. P., which permits federal courts to dismiss indictments for unnecessary delay in prosecution, is the only procedural device available to implement the constitutional guarantee of speedy trial in the federal court system. "Rule 48(b) has the same effect in implementing the Sixth Amendment as an Act of Congress would have had." [37]

In the case at bar, the Ninth Circuit Court of Appeals, following the lead of the district judge who denied petitioner's motion to dismiss the second Arizona indictment, has read *Mann v. United States* [38] to stand for the proposition that a dismissal for want of prosecution under Rule 48(b) must, of necessity, be something less than a dismissal on Sixth Amendment grounds. Although *Mann* clearly teaches that Rule 48(b) may be invoked for either constitutional or non-constitutional reasons, encompasses

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[36] See f.n. 10, *supra*, p. 14.

[37] *Petition of Provoo*, 17 F. R. D. 183, 200 (D. Md.) *aff'd per curiam* 350 U. S. 857 (1955); *United States v. McWilliams*, 163 F. 2d 695 (D. C. Cir. 1947).

[38] 304 F. 2d 394 (D. C. Cir. 1962).

both but is broader than either,[39] the courts below seem to interpret *Mann* to support the proposition that a dismissal under Rule 48(b) and a dismissal for denial of a speedy trial are mutually exclusive, the former permitting subsequent reindictment on the same charges, while the latter prohibits such subsequent prosecution.

While *Mann* explicitly holds that "a dismissal based on a finding that the constitutional right to a speedy trial has been denied bars all further prosecution of the accused for the same offense," [40] it finds upon its facts that the dismissal of the earlier indictment "was not compelled by the Speedy Trial Clause" [41] and hence not a bar to reindictment for the same offense. On its facts, *Mann* was correctly decided. Not only had the defendant contributed materially to the delay in prosecution ("* * * most of the delay was of [defendant's] own making" [42]) but it was at the prosecution's own suggestion that the trial court dismissed the indictment ("The trial judge acted, not under constitutional compulsion, but on the government's suggestion * * *" [43]). On those facts, defendant's argument that the dismissal under authority of Rule 48(b) *necessarily* compelled a finding of constitutional defect in the proceedings was foredoomed to failure, and the court rejected the contention.

In the instant case, petitioner did not cause any delay, nor did the prosecution urge dismissal of the first Arizona indictment. Quite to the contrary, the government vigor-

[39] *Id.* at 398: "Undeniably [Rule 48(b)] implements the constitutional guarantee of a speedy trial * * *. But it goes further."

[40] *Id.* at 397.

[41] *Ibid.*

[42] *Ibid.*

[43] *Ibid.*

ously opposed dismissal, as the colloquy quoted in part above[44] amply demonstrates. Moreover, at the oral hearing on the dismissal, the government expressly conceded, and the court explicitly held, that the Speedy Trial Clause of the Sixth Amendment had been violated and that the dismissal, although on the authority of Rule 48(b), was for that constitutional reason. The written order of the court which dismissed the indictment expressly so states.

Whatever reasons the government may have had for failing to appeal the dismissal of the indictment, the fact is that it did not seek review. Reindictment on the same facts cannot operate as a substitute for appeal, particularly where fundamental constitutional rights are at stake. As Judge Wright wryly remarked:

> "Indeed if [the rule that a constitutional dismissal bars further prosecution for the same offense] were otherwise, it is hard to understand why the government would ever appeal from the dismissal of an indictment, rather than simply reindict." [45]

Not only has the government, with the sanction of the Ninth Circuit Court of Appeals, bypassed its failure to seek review of the dismissal of the first Arizona indictment, but it has, by the simple expedient of shopping for a contrary judicial opinion, avoided the more stringent test of reversibility of a trial court finding required when appellate review is sought.

In *Nickens v. United States*,[46] the court made it quite plain that "[a] motion to dismiss under Rule 48(b) is

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[44] See pp. 6-10, *supra*.

[45] *Mann v. United States*, 304 F. 2d 394, 397, fn. 8 (D. C. Cir. 1962).

[46] 323 F. 2d 808, 811 (D. C. Cir. 1963); and see *United States v. McWilliams*, 163 F. 2d 695 (D. C. Cir. 1947).

addressed to the sound discretion of the trial court, and when such motion is granted, that action will be sustained *unless the trial court is shown to have acted in an arbitrary and clearly unreasonable manner.*" (Emphasis added.)

Quite apart from the havoc to orderly federal appellate procedure, the assault upon constitutional protections which must necessarily result from the use of such a cynical and transparent device as an identical reindictment for precisely the same offense, after dismissal of the first indictment on speedy trial grounds, is ominous, indeed. Once it has been determined that the government's delay in prosecution has reached constitutional proportions, any *later* reindictment for the same offenses cannot, by definition, be any *less* prejudicial to the accused than the earlier prosecution was. Documents, once lost or scattered, do not reappear, nor are memories of witnesses rejuvenated, nor investigatory trails, once cold, reheated by the passage of even more time than that which had previously been determined to be unconstitutional delay.

The realistic and effective maxim that government which is forbidden to violate the Constitution *directly* cannot be permitted to subvert that same authority by *indirection*;[47] has fitting application here. As Judge Wright has observed,[48] "the constitutional right to a speedy trial is properly enforced by dismissal of the charge when there has been prejudicial delay in bringing the case to trial" and such dismissal "bars all further prosecution of the accused for the same offense."[49] This is "a necessary rule

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[47] *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920).

[48] *Mann v. United States*, 304 F. 2d 394, 397 (D. C. Cir. 1962).

[49] *Id.* at 397.

if the constitutional guarantee is not to be washed away in the dirty water of the prosecution, leaving the government free to begin anew with clean hands." [50]

II.

THE PROCEEDINGS BELOW VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT, THE SIXTH AMENDMENT RIGHT TO COUNSEL AND THIS COURT'S SUPERVISORY STANDARDS OVER FEDERAL CRIMINAL PROCEEDINGS.

The Due Process Clause of the Fifth Amendment [51] clearly requires that a person charged with an offense must have an opportunity to prepare and be heard in his own defense.[52]

Moreover, it has become increasingly apparent that the right of the accused to the assistance of counsel, guaranteed by the Sixth Amendment [53] is of little value to the preparation of a defense unless it includes the *effective* assistance of counsel,[54] at least at and after indictment.[55]

The interrelationship between the due process right to prepare a defense, the right to effective counsel and the right to speedy trial is apparent. The proofs offered and the presumptions invoked in argument (I) *supra*, pp. 13-29, to demonstrate the prejudice to petitioner's opportunity to adequately defendant in the face of the unconstitutional

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[50] *Ibid.*

[51] U. S. Const., Amend. V: "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

[52] *In re Oliver*, 333 U. S. 257 (1948).

[53] U. S. Const., Amend. VI: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense."

[54] *Powell v. Alabama*, 287 U. S. 45 (1932).

[55] *Massiah v. United States*, 377 U. S. 201 (1964).

delay of the government are here asserted to demonstrate these further constitutional violations as well.

Moreover, should the arguments, or any of them, asserted by petitioner to be of constitutional dimension appear to this Court to require reversal on a non-constitutional basis within its supervisory power over federal criminal proceedings,[56] petitioner urges this Court to reverse his conviction on such non-constitutional ground.

CONCLUSION.

The attention of this Court has infrequently been called to the problems raised by denial of the protection of the Speedy Trial Clause and its related evils. This case provides this Court with an abundant opportunity, both under its supervisory authority over the federal court system and its power of constitutional review, to articulate meaningful standards of government conduct in regard to the important issues of speedy trial and prosecutorial delay.

The record here demonstrates that petitioner has been defeated, not by a single governmental knockout punch, but by a series of successive rabbit punches inflicted by a mammoth opponent in a gladiatorial marathon.

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[56] Revised Rules, Supreme Court of the United States, Rule 19 (1) (b) indicates the character of reasons which will be considered in grants of certiorari:

> "Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Grant of certiorari in this case will permit the Court to consider important and sweeping constitutional and supervisory questions involving due process of law and the right to speedy trial, and to correct a serious injustice to petitioner.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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LARRY S. GORDON,
JOSHUA J. KANCELBAUM,
Counsel for Petitioner.

APPENDIX.

OPINION AND ORDER BELOW.

Opinion of the United States Court of Appeals for the Ninth Circuit.

Case No. 20,426.

Before: CHAMBERS, BARNES and BROWNING, Circuit Judges

BARNES, Circuit Judge:

Appellant was indicted on February 27, 1963 in the United States District Court for the District of Arizona (No. C-16545) on twelve counts of mail fraud, and one count of using a fictitious name to defraud (18 U. S. C. §§ 1341, 1342).

On July 28, 1964, an order (erroneously stamped "Filed, July 28, 1965") was made in the said court in which the following findings were made:

> "1. That the defendant was in the custody of the United States from June 13, 1962 until November 8, 1963.
>
> "2. That the defendant was awaiting trial on indictments #3223-62, #267-62 and #8217 pending in the Federal District Court for the Southern District of Florida.
>
> "3. That the defendant was unable to post bond in the above entitled indictments.
>
> "4. Indictment #367-62 [sic] and Indictment #3223-62 were dismissed on February 25, 1963.
>
> "5. Indictment #8217 which was returned on October 17, 1962 was dismissed upon motion of the Government on November 8, 1963.
>
> "6. That the Indictment in the above styled cause presently before the Court was filed with the Clerk of this Court on February 27, 1963.

"7. That the records of this Court reflect that the bond direction was received from the Southern District of Florida on December 4, 1963 and that the file warrant was returned executed by the United States Marshal on December 11, 1963.

"8. That the defendant from the period beginning February 27, 1963 until the latter part of November, 1963, had no knowledge of the indictment in the above entitled cause, and was not informed of the nature of the charges against him and was not arraigned before a Court until December 30, 1963.

"9. That the defendant was in the custody of the United States for a period of at least nine months while this indictment was pending and was denied an opportunity to prepare his case and to have a right to a speedy trial.

"10. That the defendant has been deprived of his right to a speedy trial pursuant to the Sixth Amendment of the Constitution of the United States.

"THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the indictment in the above entitled cause be and hereby is dismissed upon the ground of unreasonable delay in bringing the defendant to trial. [Fed. R. Crim. P. 48(b).]

"IT IS FURTHER ORDERED, that the bail heretofore posted in the above entitled cause be continued in effect until twelve o'clock noon on September 28, 1964, and may be transferred to any subsequently returned indictment against the defendant in this District. [Fed. R. Crim. P. 12(b)(5).]

"IT IS FURTHER ORDERED, that in the event there is no transfer of bond prior to September 28, 1964, that on September 28, 1964 the Clerk of this Court enter an Order exonerating the bond heretofore posted in this case." (C. T. pp. 72-73.)

At that time the court stated:

"Now, you may draw the order, Mr. Green, if you wish. Recite that it appearing to the court—an order

under Rule 48, of course—that this defendant was indicted on a certain date, and that he was not advised of the indictment, not informed of the indictment until—whatever the record shows—some nine months later, isn't it?

"Mr. Green: Yes, sir.

"The Court: And that, therefore, there has been an unnecessary delay in bringing the defendant to trial on the indictment. Then order the indictment dismissed. Then further order that the bail be continued in effect pursuant to the rule that I have stated. * * *" (R. T. pp. 63-64.)

Subsequently, a new and similar indictment was filed in the same court (No. C-16986) in twelve counts, alleging the same offenses. One count was later dismissed and defendant was ultimately convicted on eleven counts.

A timely motion to dismiss the second indictment with prejudice was made by appellant on the ground the previous dismissal was a bar to the prosecution of the second indictment. In ruling on this, a second judge sitting in the District Court of Arizona, after reciting the history of the matter and the contentions of the parties, ordered as follows:

"IT IS ORDERED that the defendant's motion to dismiss with prejudice is denied. The motion and argument fail to disclose wherein the defendant is prejudiced under the new indictment or wherein his rights under the Fifth or Sixth Amendments of the Constitution have been violated. Moreover, the Court in Cause No. C-16545-Phx., based its order of dismissal upon the Government's failure to prosecute, which does not bar a new indictment. (*Mann v. U. S.*, 304 F. 2d 394)." (C. T. pp. 104-05.)

I.

The foregoing factual situation presents the first of appellant's two claims of error—that it was error to fail to

deny the motion to dismiss the second Arizona indictment, after the first had been dismissed for lack of a speedy trial.

Appellant asserts this question has never been presented to a United States Circuit Court of Appeals. He therefore relies on the language of certain state court cases (illustrated by *People ex rel. Nagel v. Heider*, 80 N. E. 291, 225 Ill. 347 (1907)), and *Mann v. United States*, 304 F. 2d 394 (D. C. Cir. 1962).

We point out, however, that in the *Heider* case, the Illinois legislature had seen fit to give effect to Section 9 of Article II of the United States Constitution by enacting Section 18 of Division 13 of the Criminal Code, to-wit:

> "Any person committed for a criminal offense * * * and not admitted to bail and not tried * * * within four months from the date of commitment (if within the term of court) or within four months after the beginning of a new term * * * shall be set at liberty, unless [etc.] * * *."

As Judge Thomsen pointed out in *Petition of Provoo*, 17 F. R. D. 183, Congress had passed no statute defining the term "speedy trial." He noted the Supreme Court had said in *Beavers v. Haubert*, 198 U. S. 77, 87 (1904):

> "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to defendants. It does not preclude the rights of public justice."

In *Mann v. United States, supra*, the dismissal seven months after indictment was "for want of prosecution" after the government misplaced and could not find a missing document essential to the prosecution. At the time of dismissal, the judge urged the government's attorney to investigate the disappearance of the evidence and commented that since the statute of limitations had not run, appellant could be reindicted. Appellant was reindicted when the missing evidence was found.

It is true the court did say, as appellant states, "a dismissal based on a finding that the constitutional right to a speedy trial has been denied bars all further prosecution of the accused for the same offense." 304 F. 2d at 397. But this is purely dictum, for after reciting the above rule, Judge Wright observes: "But these principles do not decide this case." 304 F. 2d at 397. He then pointed out: "And the court clearly expressed its intent to award the dismissal without prejudice to further prosecution. . . ." 304 F. 2d at 397.

It is also noteworthy that Judge Wright's profusely footnoted opinion cites no case authority for the principle he states, and specifically states "there appears to be no express articulation of the rule in the reported decisions."

One writer has said a speedy trial means a trial "free from vexatious, capricious, or oppressive delays manufactured by the ministers of justice." Black's Constitutional Law § 266.

The question here raised involves a nice balancing of two rights of society—the primary obligation to the state to ascertain the guilt or innocence of the accused, and the accused's right to have the accusation determined without oppressive delay.[1]

In *Frankel v. Woodrough*, 7 F. 2d 796, 798 (8th Cir. 1925), that circuit states, as dictum:

> "The Constitutions of most of the states have provisions similar to the Sixth Amendment and many of the states have statutory definitions of the time or number of court terms within which criminal accusations must be tried. Such statutes provide usually for the discharge of accused unless the trial is within

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[1] This "nice balancing" is reflected in the California statute which bars, after dismissal, a second prosecution for a misdemeanor, but not for a felony. (120 C.A.2d 741.)

> the limits so defined. The United States has no such statutory provisions and we think an accused would not be entitled to a discharge even though he were denied a speedy trial within the meaning of the Constitution. His right and only remedy would be to apply to the proper appellate court for a writ of mandamus to compel trial."

That decision, of course, was rendered prior to the adoption of Rule 48(b) of the Federal Rules of Criminal Procedure. But Rule 48(b) likewise specifies no time limits.

In *United States v. McWilliams,* 163 F. 2d 695 at 696, the District of Columbia Circuit, in upholding a dismissal by Judge Bolitha Laws (cf. 69 F. Supp. 812 (1946)) stated it was obviously within the trial court's discretion to so dismiss, *after*: (a) one mistrial in 1944; (b) several motions for trial, made by defendant, had been denied in 1945; (c) three continuances to permit the government to obtain "new evidence" in 1946 had been granted.

In the leading case of *Provoo, supra,* the court points out Provoo was indicted in 1949, and tried in 1952-53. His conviction was reversed, and a new indictment filed in October 1954. This was dismissed in March 1955. From 1951 on, Provoo had moved for dismissal, and objected to continuances, without avail. An important factor is mentioned in Judge Thomsen's opinion:

> "The serious delay in this case was not the delay in bringing the New York case to trial, but the delay caused by the deliberate act of the government in bringing the case in New York in the first place, when the government must have known that venue in New York was at best doubtful, and took the chance for the supposed advantage to the government of proceeding in New York. [refusing to supply facts to defendant's counsel which would have disclosed lack of venue in New York]." 17 F. R. D. at 201.

Judge Thomsen also emphasized his decision was based solely on the facts of the *Provoo* case.

> "It is not necessary in this case to decide how far rights under the speedy trial provisions of the Sixth Amendment may go. It is only necessary to decide the effect of the facts in this case." 17 F. R. D. at 202.

He also found as a fact that prejudice to Provoo had been shown, without making the flat ruling such prejudice is necessary to a defendant's release.

In 50 A. L. R. 2d 943, the general rule is summarized:

> "In the case of a dismissal of a prosecution for delay therein * * * it seems, in the absence of specific statutory authority therefor, it has been held the accused can again be prosecuted for the same offense."

Citing *Ex Parte Altman,* 34 F. Supp. 106 (S. D. Calif. 1940), wherein an indictment dismissed "for want of prosecution" was reinstated.

And as *Mann v. United States, supra,* points out, a Rule 48 (b) dismissal does not necessarily involve the constitutional right to a speedy trial.

> "The accused cannot complain because a liberal application of the Rule [48] earns him temporary freedom, without according him full immunity from prosecution.[15] At most, he is entitled to know whether the sword of Damocles still hangs over him. If the dismissal is granted pursuant to a finding that

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> "[15] The inflexible rule that every dismissal for want of prosecution is necessarily with prejudice announced in District of Columbia v. Healy, D.C.Mun.App., 160 A.2d 800, is, of course, not binding on this court. Nor is it persuasive, or it is grounded on the fallacy that the defendant gains nothing by dismissal unless all further prosecution is barred. This ignores the very real advantage of being enlarged and freed from pending charges, even temporarily."

the Speedy Trial Clause has been violated, the court should expressly dismiss with prejudice. Otherwise, the dismissal should note that it is awarded without prejudice to prosecution on a new indictment or information. Here the required warning was given,[16] and, under the facts, it was clearly a proper ruling. The conviction, the sentence, and the order denying the motion to vacate sentence are accordingly

Affirmed."

"[16] As a matter of form, the notation that the dismissal is granted with or without prejudice should be part of the written order. But the defect here is not fatal, since appellent was in fact advised by the judge through his colloquy with the government's attorney." (304 F.2d at 398.)

Here the judge, in his first order, *must* have contemplated the possibility of a new indictment, because of his specific reference to "any subsequently returned indictment against the defendant." And just as in *Mann, supra,* the appellant was here advised by the judge, through colloquy with counsel, that the dismissal was *not* with prejudice. (C. T. pp. 52-55, *et seq.*)

The delay here (in serving the first indictment) was less than one year. "It appears thus far that the constitutional violation will seldom, if ever, be declared unless the delay lasts over a year." 57 Calif. L. Rev. 852, n. 38 (1957). It does not appear that the delay was deliberate or oppressive, nor that it adversely affected appellant's defense.

In his reply brief, appellant alludes to the "possibility" that *Griffin v. California,* 380 U. S. 609, 614 (1965), is applicable. Appellant's trial took place from March 9, 1965 to March 17, 1965, inclusive. *Griffin v. California* was decided April 28, 1965. Its rule was held to have no retrospective application in *Tehan v. Shott,* 382 U. S. 406 (1965).

We hold the order of the second district court judge,

refusing to dismiss the second indictment with prejudice, was not clearly erroneous.

II.

Appellant's second claimed error relates to the trial itself. He urges that the court refused to give an instruction that the defendant does not have to take the stand, and this cannot be held against him (etc.). The appellant relies *exclusively* (Brief, p 16) on *Bruno v. United States*, 308 U. S. 299 (1939).

That case is wholly inapplicable. There Mr. Justice Frankfurter stated:

> "The narrow question before us is whether in these circumstances Bruno had the indefeasible right to have the jury told in substance *what he asked the judge to tell it.*" (308 U. S. at 292.) (Emphasis added.)

This court has heretofore referred to and emphasized the necessity of a proper request in *Langford v. United States*, 178 F. 2d 48 (9th Cir. 1949), where we referred to "the instruction *which was held to have been properly requested in Bruno v. United States* * * * [etc.]." (Emphasis added.)

In other words, for error to exist, the instruction on the lack of any presumption against the defendant when he fails to take the stand must not only be legally sound, it must be requested in a proper and timely manner.

In *Langford, supra,* the defendant made no objection to the erroneous instruction, and we held he had waived the point.

Appellant's counsel made no compliance with Rule 30—which requires a written request to instruct on the law, "as set forth in the requests." Appellant's note to the

judge (Court's Exhibit VII) did not "set forth" the language in which he desired the jury instructed.[2]

Further, the trial court attempted to comply with defendant's untimely request, and before the jury retired, he asked counsel:

> "Does either Counsel have any further instructions to offer at this time?"

Government counsel asked:

> "What was the statement you made about failure of the defendant to take the stand?"

To which the court replied:

> "I tacked it on, that he didn't have to present any testimony, including his own testimony."

To which counsel for appellant replied: "All right." (R.T. p. 1275.)

After the bailiffs had been sworn and the jury had withdrawn from the court room to commence deliberations, appellant then withdrew his consent to the instruction and orally requested an instruction that "the defendant does not have to take the stand and that this fact cannot be held against him nor any inference made thereto." (R.T. pp. 1277-1278.)

Rule 30 of the Federal Rules of Criminal Procedure provides in part that "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict. * * *" In the instant case appellant did not object to the instruction on the right of an accused not to testify

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[2] This note, written on the back of a refused instruction reads:

> "I want to approach bench before instructions,
> I think I forgot to ask for instruction that defendant doesn't have to take stand and can't be held against him, etc."

and further, he had specifically stated that the instruction given was "all right." "In the absence of plain error," (*Singer v. United States*, 380 U.S. 24 and 38 (1964)) appellant's failure to object has foreclosed the right to review. *Phillips v. United States*, 334 F.2d 589 (9th Cir. 1964), *cert. den.* 379 U.S. 1002. Failure to instruct on the right of an accused not to testify, is not reversible error in the absence of a request or objection. *Pereira v. United States*, 202 F.2d 830 (5th Cir. 1953), *aff'd* 347 U.S. 1.

The request to order the entry of a judgment of acquittal as to all counts is denied, and the conviction on all counts is *Affirmed*.

Order of Affirmance by The United States Court of Appeals for the Ninth Circuit.

Case No. 20,426.

Appeal from the United States District Court for the District of Arizona.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered September 8, 1966

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